



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 10, 2005

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OR2005-10178

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 236233.

The Texas Department of Insurance (the "department") received a request for copies of ZiroC, Inc.'s (IROAmericaInc.) ("IRO") application for independent review certification; IRO's number, type, and minimum qualifications of the personnel either employed or under contract to perform the independent review; IRO's written procedures used to determine whether physicians or other health care providers utilized by IRO are licensed, trained, and in good standing; complete profiles of IRO employees conducting independent reviews; IRO's directing physician's current license; and IRO's credentialing policies and procedures. You state that some of the requested information will be provided to the requestor. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. Additionally, you state that some of the requested information may implicate the proprietary or property interests of third party IRO. Accordingly, you state, and provide documentation showing, that you have notified IRO of the request and of its opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances).* In response to your section 552.305 notice, IRO argues that its application

for independent review certification is excepted from disclosure under section 552.110 of the Government Code. We have considered all of the submitted arguments and reviewed the representative sample of information submitted by the department.<sup>1</sup>

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. The department claims that some of the submitted information is confidential under article 21.58A of the Insurance Code. Article 21.58A relates to Health Care Utilization Review Agents and provides in part:

(i) Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers . . . Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code art. 21.58A § 4(i). You explain that the submitted screening criteria and review procedures are part of the utilization review plan, and are the types of information that are confidential under section 4(i) of article 21.58A. Based on your representations, we agree that the information you have marked is confidential pursuant to section 21.58A of the Insurance Code and must be withheld under section 552.101 of the Government.

You also claim that some of the submitted information is confidential pursuant to article 21.58C of the Insurance Code. Section 2(h) of article 21.58C provides as follows:

(h) Information that reveals the identity of a physician or individual health care provider who makes a review determination for an independent review organization is confidential.

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<sup>1</sup> We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Ins. Code art. 21.58C § 2(h). You state that some of the submitted information constitutes a list of the identity of the physicians “that will be part of the panel providing review determinations.” Based on your representations and our review, we agree that the information you have marked, in addition to the information we have marked, is confidential pursuant to section 2(h) of article 21.58C of the Insurance Code, and therefore must be withheld under section 552.101 of the Government Code.

Next, you argue that the social security numbers within the remaining submitted information are excepted from disclosure. Section 59.001 of the Occupations Code provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001.<sup>2</sup> You explain that the information at issue must be filed as part of the application to be licensed as an independent review agent. Based on your representations, we agree that the marked social security numbers are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 59.001 of the Occupations Code.

Section 552.101 also encompasses common law privacy. The doctrine of common law privacy protects information if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon our review of the submitted information, we agree that the department must withhold the information you have marked under section 552.101 in conjunction with common law privacy.

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<sup>2</sup> This section was renumbered from Occ. Code § 58.001 by the Act of May 25, 2005, 79th Leg., R.S., H.B. 2018, § 23.001(68).

You also assert that some of the submitted information is excepted pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personal matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. Additionally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision 615 at 4-5.

You represent that the information you have marked consists of advice, recommendations, and opinions reflecting the department’s policymaking. Having reviewed the information at issue, we agree that the marked information consists of advice, recommendations, and opinions reflecting the policymaking processes of the department. Therefore, the department may withhold the information you have marked under section 552.111 of the Government Code.

We note that a portion of the remaining submitted information is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130. Thus, the department must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130.

Finally, you assert that the e-mail addresses you have marked are excepted pursuant to section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
  
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. You state that no consent has been given for the release of any of the e-mail addresses at issue. Thus, we agree that the e-mail addresses you have marked are excepted from disclosure under section 552.137(a).

We now turn to IRO's arguments under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: 1) trade secrets, and 2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or

preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . A trade secret is a process or device for continuous use in the operation of a business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>3</sup> *Id.* This office accepts a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Gov’t Code § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted brief, we conclude that IRO has not demonstrated that any portion of its application for certification qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. *See* Open Records Decision No. 552 at 5-6

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<sup>3</sup> The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- 1) the extent to which the information is known outside of [the company];
- 2) the extent to which it is known by employees and others involved in [the company’s] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] in developing the information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982); 306 at 2( 1982), 255 at 2 (1980).

(1990); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939). We also find that IRO has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of its application for certification would likely result in substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, qualifications and experience, and pricing). Accordingly, the department may not withhold any portion of IRO's application for certification pursuant to section 552.110.

In summary, the department must withhold the following information under section 552.101 of the Government Code: 1) the submitted screening criteria and review procedures under section 4(i) of Article 21.58A of the Insurance Code, 2) the marked information under section 2(h) of article 21.58C of the Insurance Code; 3) the marked social security numbers pursuant to section 59.001 of the Government Code; and 4) the marked common law privacy information. The department may withhold the information you have marked pursuant to section 552.111 of the Government Code. The Texas motor vehicle information we have marked under section 552.130 of the Government Code must be withheld by the department. The marked e-mail addresses are excepted under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

LVC/segh

Ref: ID# 236233

Enc: Submitted documents

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